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CHARLES ELMORE

Supreme Court of the United States

No. 372

THE CITY OF CINCINNATI, a Municipal Corporation,
Petitioner,

vs.

MARGARET W. VESTER,
Respondent.

No. 373

THE CITY OF CINCINNATI, a Municipal Corporation,
Petitioner,

vs.

JAMES S. RICHARDS and PASCHAL L. RICHARDS,
Respondents.

No. 374

THE CITY OF CINCINNATI, a Municipal Corporation,
Petitioner,

vs.

LLEWELLYN B. REAKIRT,
Respondent.

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

I.

STATEMENT OF THE CASE

The Attempted Appropriation

On March 21, 1928, the petitioner, the City of Cincinnati, by its council, passed the ordinance to appropriate a strip of land twenty-five (25) feet in width adjacent to the south

line of Fifth Street extending eastwardly from Main Street to Pike Street, a distance of about five blocks, for the purpose of widening the street. Intersecting ways within this space are Lawson Alley, Sycamore Street, Broadway and McAllister Street. The eastern end of the strip is near the heart of the down-town district, Main Street, Sycamore Street and Broadway being avenues of first importance.

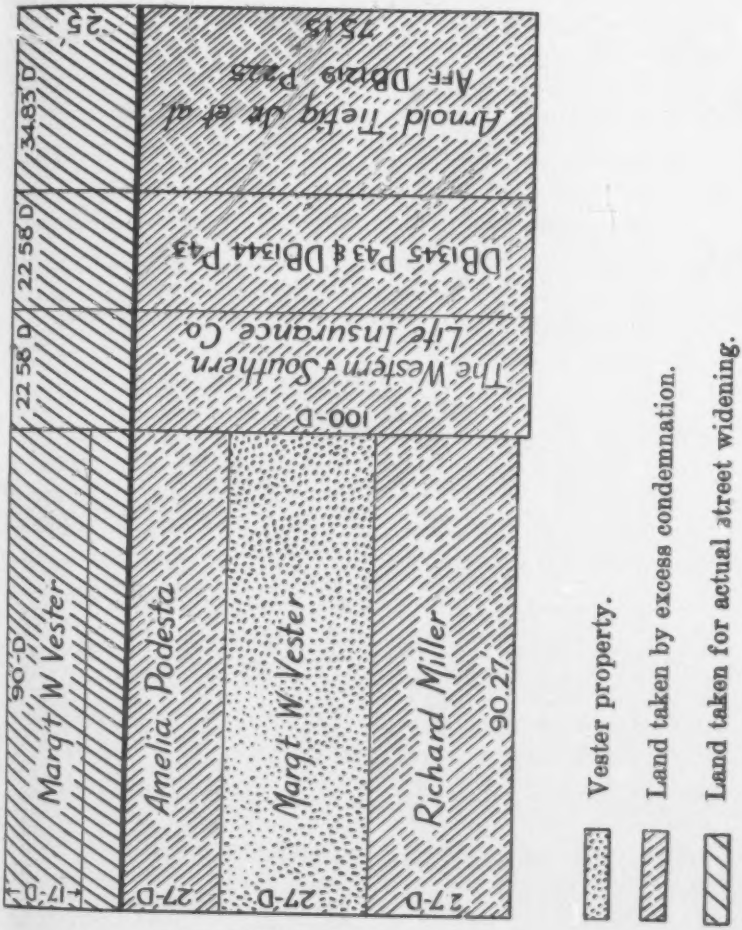
By the same ordinance the city undertook to condemn the additional areas adjacent to this strip on the south by way of "excess condemnation." *It was stated in the preliminary resolution that the same are "in excess of that actually to be occupied by said improvement."* No statement of the use to be made of these areas was set forth, the city contenting itself with the bare assertion that they were wanted "for the more complete enjoyment and preservation of the benefits to accrue from the taking of the twenty-five foot strip." But by what usage, how or why was not stated.

Repondents' Properties

Mrs. Vester's Case

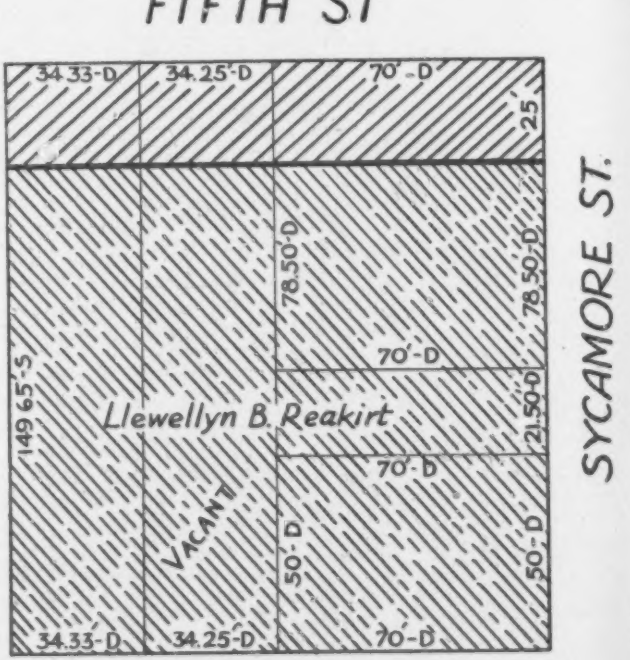
The respondent, Margaret W. Vester, owns a lot on Broadway, lying 44 feet south of Fifth Street and therefore 19 feet south of the 25-foot strip desired by the city for the widening of Fifth Street. It is well improved by a good brick house of three stories, quite in keeping with the general neighborhood, an entirely lawful structure which affords no impediment whatever to the complete enjoyment and use by the city of the 25-foot strip. This house, as shown by the evidence, is occupied by Mrs. Vester's son, a physician of high standing and in active practice, a member of the staff of one of the leading hospitals, and a general practitioner and surgeon, who desires to retain his office at that place. Between Mrs. Vester's property and the 25-foot strip is the property of another physician, Dr. Joseph

Podesta. It may be stated, to avoid confusion, that Mrs. Vester also owns the corner of Fifth and Broadway which is within the 25-foot strip, where her husband conducts a drug store. *No objection is proposed by the respondent to the appropriation of that property.*



Mr. Reakirt's Case

Llewellyn B. Reakirt owns a vacant tract of land at the southwest corner of Fifth and Sycamore Streets. It comprises several lots, two of which are not contiguous to the 25-foot strip. This tract fronts 140 feet on the south side of Fifth Street and 150 feet on the west side of Sycamore Street. It is a very valuable piece of land, under lease and subject to a privilege of purchase which may be exercised only during the years 1955 and 1956 at $600,000.00. Owing to the pendency of the present appropriation proceedings,



THE REAKIRT PROPERTY

Land taken by excess condemnation.

Land taken for actual street widening.

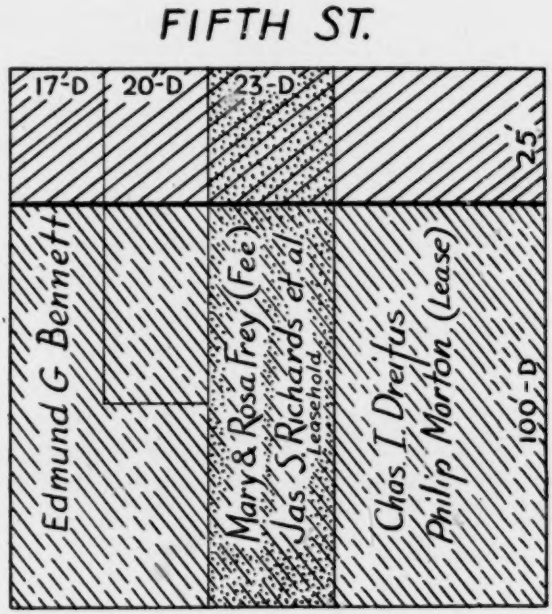
it is vacant, except that it is temporarily used as a parking lot with a small, and also temporary, wooden oil filling station near the corner.

The lessees were about to erect a handsome fifteen-story building upon this piece of property for the projected Century Athletic Club, the building to be in keeping with all that is best in the city and set back to the new proposed street line, but this improvement was blocked when the city passed the resolution to appropriate the entirety of this property as "excess." The tract is level and not needed by the city for any physical reason in connection with the widening of Fifth Street, such as sustaining a slope or for drainage or the like, and is, of course, already subject to all building laws and ordinances and zoning restrictions. The twenty-five-foot strip taken from the northern margin of this property would constitute but one-sixth of its area, the so-called "excess," or, as counsel for the city is pleased to term it, "remnant," amounting to five-sixths of the whole.

The City has never been able to point out a single reason for its attempted taking of the five-sixths, except its desire to speculate upon the value thereof which it hopes will be increased when the same is combined by force of this appropriation with other lands, likewise termed "excess," lying adjacent and to the west thereof.

The Richards Case

James Richards and Paschall Richards, brothers, own a leasehold, with privilege of purchase, upon a well-improved lot running through from Fifth Street to Buchanan Street, near Pike Street. The city proposes to take not only the front 25 feet, but the remaining 75 feet to the street in the rear as well. In this case, as well as in the Reakirt case, no objection is made to the condemnation of the 25-foot strip thereof to be used for street purposes.



Richards property.

Land taken by excess condemnation.

Land taken for actual street widening.

II.

CONDEMNATION FOR SPECULATIVE PURPOSES

Resolution Failed to State Purpose of Appropriation

We deny our opponent's affirmation that the condemnation proceedings were had in strict conformity with the laws of Ohio. On the contrary, the resolution in failing to state the *purpose* for the condemnation of the so-called excess, distinctly violated the law of Ohio.

Section 3679 is as follows:

> "Sec. 3679. *Resolution shall be passed.* When it is deemed necessary to appropriate property, council shall pass a resolution, declaring such intent, *defining the purpose of the appropriation,* setting forth a pertinent description of the land, and the estate or interest therein desired to be appropriated. For water works purposes and for the purpose of creating reservoirs to provide for a supply of water, the council may appropriate such property as it may determine to be necessary." (Our italics.)

The city failed to define the purpose of the appropriation in its resolution declaring its intent to appropriate the property, the resolution being in substantially the same terms as the ordinance hereinabove referred to. Nor is the purpose elsewhere stated. (R. 85.)

In its present brief the city says:

> "Council does not commit itself to any particular use of the excess to be appropriated. Non constat but what, after it has the excess, it may establish small parks or open air parking places for automobiles, or it may widen Fifth Street still further. To be sure, the probabilities are that most of the excess will be resold subject to restrictions, but if so, it will be only after a finding that 'it is not needed for any municipal purpose.' "

Again the city says in its brief:

> "Obviously an impersonality such as a city cannot very well testify as to what its plans and hopes are,"

and goes on to say that any court ought to take judicial notice of at least two things in the situation presented—the elimination of old buildings mutilated by the street widening, and the immediate aggregation of small parcels of irregular shape as a desirable object in laying out the property along the newly widened highway. Neither of these

objects, of course, has any possible bearing whatever upon the Reakirt and Vester properties.

It is, therefore, the city's present position that it is making a "blind" appropriation; that the city proposes to take this property without committing itself to any use, public or private, to which it may ultimately see fit to put it. We submit here that these admissions should defeat this appropriation.

Grounds of Appropriation as Stated in the District Court

The city was more frank in the District Court both in pleading and in argument. Having been charged in the bill with appropriating property for the purpose of speculation, the city's answer was as follows:

> "In conclusion the City of Cincinnati expects two things in connection with the application of the principle of excess condemnation of plaintiff's property and to other property along the south side of Fifth Street from Main Street to Pike Street, to-wit:
>
> "1st. That the city will be able to further the appropriate development of the south side of Fifth Street, between Main and Pike Streets by using or disposing of its excess in tracts of such size and with such restrictions as will inure to the public advantage.
>
> "2nd. That the increase in value of plaintiff's property and other properties which may accrue by reason of the improvement contemplated by the city will pay in part the very heavy expense to which the city will be put in effecting the improvement."

In argument, however, the purpose of the city was even more definitely admitted, for the trial judge in his opinion (R. 28) found as follows:

> "It is frankly conceded, I think, in argument if not in the evidence, that the purpose of this excess condemnation was the recoupment, by dealing in real es-

tate, of a large portion of the heavy expense necessary for this project. So far as we have been able to analyze the evidence, this is the only motive or purpose of the excess condemnation, the only method in which such excess condemnation can, in the language of the constitution, be in furtherance of the public use. Not even slight suggestions are given to the Court as to the restrictions which shall be imposed in case of resale to preserve the improvement made, except and unless such restrictions may be considered as founded upon the intent to aggregate the numerous parcels so appropriated, or to consolidate into one ownership a multiplicity of individual ownerships."

Again (R. p. 31):

"Certainly, the mere appropriation of excess for the purposes of resale at a profit is not in furtherance of the purpose of the municipal improvement here, which is the construction of a street or highway. Nor would any restrictions that might be imposed upon the resale of this property in any way affect or preserve the improvement of the street. In fact, the only suggested restrictions have been that the city might aggregate the separate parcels and thus restrict building in this vicinity to that of such size and nature as would improve the entire locality and benefit the community as a whole. This is not a restriction in support of or connected with or in any way preserving the improvement of Fifth Street."

And finally (R. p. 33):

"On the whole, we are unable to believe that the only possible ground for this excess condemnation which is disclosed or even suggested in the present case, that is, the dealing in real estate for profit, bears any such close connection with the improvement or constitutes such a public use as would justify this excess condemnation."

We submit that the finding of the trial judge on this question of fact is entitled to weight.

The city must be bound by the answer which it filed to the bill, as explained by its statements to the Court on the hearing. It there disclosed that it was taking this property for the purpose of aggregating it, and reselling it under possible restrictions, thereby hoping to make the money on the resale to pay the cost of the improvement. It should not now be permitted "to mend its hold." *Railway Company* v. *McCarthy,* 96 U. S. 258 at p. 267.

Inequality of Selection

The city is wrong when it says in its brief that it has appropriated "the entire remnant of every parcel truncated by the widening." On the contrary, it has not been impartial in its excess condemnation but has exercised the discrimination of the speculator, which in this instance it is, selecting what it thinks it can sell at a profit when it has aggregated the holdings of the respondents and others. Thus, the property adjacent on the west to Mr. Reakirt's property is taken only to the depth of one hundred feet, but his, being perhaps the most valuable vacant tract in the heart of the city at this time, is taken to its full depth of one hundred and fifty feet.

The house known as the John Van Range Company building, owned but not used by the Cincinnati Masonic Temple Company, available for long lease, and displaying a sign that it will be remodeled to suit tenants, fronts on Fifth Street and runs southwardly one hundred feet along Broadway just opposite Mrs. Vester's property. Only the front portion of this building to a depth of twenty-five feet is taken. The remainder is to be left in its present ownership —a flagrant instance of partiality—as Mrs. Vester is asked to surrender her property on Broadway, directly opposite. Indeed, as far as the physical situation is concerned, the

John Van Range Company building is in precisely the same situation as the Richards property.

The excess condemnation area has not been extended to the property lying on the north side of Fifth Street, which, of course, is equally contiguous to the improvement and equally affected by the widening. The "recoupment" is laid entirely upon selected parcels on the south side of Fifth Street; we say "selected" because the Masonic Temple property, the Fontbonne Building and the John Van Range building are omitted from the operation of the excess condemnation. The owners of the Fontbonne and Masonic Temple have not donated the twenty-five-foot strip; they are to be compensated for the same although they have already set their buildings on the new line. The owner and lessees of the Reakirt property were ready and willing to set back their Century Athletic Club building to the widened street line and retain the residue of their property, but this privilege, although extended to the owners of the property above named, was denied to them. Thus it will be seen that this excess condemnation, besides being for a non-public use, as we contend, is not made to operate equally upon all of the properties similarly situated.

The Proceedings in the Court of Common Pleas

In Ohio, a municipal condemnation case, as distinguished from one brought by a railroad company or similar corporation, is merely an appraisal in which neither an answer denying the right of condemnation nor a cross-petition is permissible. The only remedy if the city has exceeded its powers and appropriated without right, is an independent and separate action for an injunction. This is firmly established. *P. C. C. and St. L. R. R.* v. *Greenville,* 69 O. S. 487; *Sargent* v. *City of Cincinnati,* 110 O. S. 444; *State* v. *Eastman,* 118 O. S. 121.

In the first of these cases the court held that there was no provision by which the railway company (whose prop-

erty was being appropriated by the City (Greenville) had a right to file an answer to the application.

> "Nor is there any authority for filing a cross-petition by the railway company setting up the unnecessary interference with its property. No provision is made for the making or trial of such an issue, and the court is without authority to render a judgment upon such issue if made." (pp. 496, 497.)

This passage was quoted, re-affirmed and applied in the second case above cited (pp. 453-454), and in the last case it was held that even a writ of prohibition would not lie to restrain an unwarranted appropriation, the court saying:

> "The proposition that injunction will lie to prevent an unwarranted or unauthorized proceeding in appropriation has been conclusively determined by the decisions of this court." (p. 128.)

It was therefore impossible for the respondents to protect themselves by answer or cross-petition in the appropriation proceedings begun in the state court and they were driven to recourse to the present proceedings.

III.

THE SCOPE OF THE CASE

This case does not involve the validity of excess condemnation in its full scope and breath or as applied for other purposes and under other circumstances. Certainly the Reakirt and Vester cases do not involve in the slightest degree the theory of small remnants of irregular shape and size, nor odd pieces of real estate; the only phase of excess condemnation that has up to this time ever found the least sanction in any court in the United States thus far found or cited. The present issue does not involve excess condemnation for the protection of public buildings or similar improvements. It involves only *excess condemnation for recoupment or profit.*

This subject is dealt with in Chapter 4 of Cushman on "Excess Condemnation" cited by our opponents. That author follows with a chapter entitled, "Financial Gains and Risks of Excess Condemnation," which indicates the character of the present undertaking.

As to the constitutionality of the project the same author speculates upon the outcome of such a case as this in the following language:

> "In the light of these facts it seems fair to assume that the judgment of the Supreme Court upon the constitutionality of excess condemnation will depend upon the purpose for which that policy is used. If the only motive for the application of that scheme was to secure to the city treasury the profit which might accrue from the resale of the surplus land taken it could probably be argued with much cogency that the financial need of the city did not constitute a public purpose of the kind which would justify the condemnation of the land of particular citizens, and that the use of eminent domain for that purpose was a denial of the equal protection of the laws and a deprivation of property without due process of law."

It is evident, therefore, that the courts below are not alone in finding a difference between the present attempted application of excess condemnation and other uses to which the power might more appropriately be put.

The Legislature of Ohio, even before the adoption of the present excess condemnation amendment had conferred upon municipalities (Section 3677-12) the right to condemn excess property for the protection of buildings and their environs, to preserve the view, appearance, light, air and usefulness of public grounds occupied by such buildings and esplanades and parkways leading thereto. With these desirable objects of excess condemnation we have no quarrel.

Change of Base

The petition now abandons the statement of objects for this appropriation as set forth in the answer, and brings forth a list of five alleged objects now, for the first time and without any support in the evidence, said to have been considered by the Council in passing this ordinance:

1. Damage to residue would equal the value of the same.
2. Provision against temporary unsightly uses such as patched buildings, or bill boards.
3. The aggregating of lots for business space.
4. The development in harmony with the widened street.
5. The development on the south side of the street would hasten the development on the north.

There is here a scrupulous avoidance of the original avowed purpose of *resale for profit.*

Our opponents cite three justifications, not for this particular application, but for excess condemnation generally:

1. The avoidance of remnants;
2. The preservation and amplification of the improvement; and
3. The recoupment of expense.

The first two have on this record no application to this case, and the scope of the real, genuine question here involved is whether the city can take the respondents' properties which are unnecessary to, and in two of the instances, disassociated from the actual improvement, for the purpose of reselling the same to other private individuals at a profit.

IV

ARGUMENT

Due Process of Law

We do not deem it necessary to join issue with our opponents upon their attempted definition of due process of law. We ground our case upon the proposition as already established and settled, that an appropriation for a non-public use contravenes the Fourteenth Amendment, the constitutional right to due process, and to the equal protection of the laws. For this we rely upon the following statements of law from *Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196 U. S. 239 at pp. 251, 252:

> "There ought not to be any dispute, at this day, in reference to the principles which must control in all cases of the condemnation of private property for public purposes. It is fundamental in American jurisprudence that private property cannot be taken by the Government, National or State, except for purposes which are of a public character, although such taking be accompanied by compensation to the owner. That principle, this court has said, grows out of the essential nature of all free governments. *Loan Association* v. *Topeka*, 20 Wall. 655; *Cole* v. *La Grange*, 113 U. S. 1, 6. If the purpose be public the taking may be outright, provided reasonable, certain and adequate provision is made, at the time of the appropriation, to ascertain and secure the compensation to be made to the owner. *Cherokee Nation* v. *Southern Kansas Railway Co.*, 135 U. S. 641, 659; *Sweet* v. *Rechel*, 159 U. S. 380, 399; *Western Union Tel. Co.* v. *Pennsylvania R. R. Co., et al.*, 195 U. S. 540. Any state enactment in violation of these principles is inconsistent with the due process of law prescribed by the Fourteenth Amendment. *C. B. and Q. R. R. Co.* v. *Chicago*, 166 U. S. 226; *San Diego Land, etc., Co.* v. *National City*, 174 U. S. 739, 754; *Smyth* v. *Ames*, 169 U. S. 466, 525. • • • ,,

Also: *Fallbrook* v. *Bradley*, 164 U. S. 112 at p. 158.

Lewis on "Eminent Domain," 3rd ed., Section 315, says:

> "The Fourteenth Amendment forbids any state to deprive a person of his property without due process of law. To take property for other than a public purpose, either under the guise of taxation or of eminent domain, is to violate this provision."

McQuillan on "Municipal Corporations," 2nd ed (1928), Section 1600, reviews the subject as follows:

> "Only a few of the state constitutions in terms prohibit the taking of private property for private use. All courts, however, agree that this cannot be done. Different courts find different reasons for this conclusion, some putting it on the ground of an implied prohibition in the eminent domain provision of the constitution, some on the ground that it would be contrary to the provision that no person shall be deprived of his property except by the law of the land, others on the ground that it would be subversive of the fundamental principles of free government or contrary to the spirit of the constitution. • • •
>
> • • • • • • • • •
>
> "The use is not public where the benefit to the municipality is merely incidental and purely prospective. Likewise, property cannot be condemned to obtain the possible income or profit that might inure to the municipality from the ownership or control of it."

It is, of course, immaterial that such condemnation for a non-public use may be attempted under apparent authority of a state constitution, but it is interesting to note that such a conflict of state and federal constitution over such an attempted appropriation actually occurred in *In re Tuthill*, 163 N. Y. 133, 49 L. R. A. 781 (1900).

And, of course, the Fourteenth Amendment protects against actions by municipal corporations acting under power conferred by the State. *C. B. and Q. Ry. Co.* v. *Chi-*

cago, 166 U. S. 226; *The Home Telegraph and Telephone Company* v. *Los Angeles*, 227 U. S. 278, Syl. 5.

And, to clear the way for the main argument, we further submit that Section 266—Judicial Code—denying the right of injunction to stay proceedings in a state court, does not apply here because it is not sought to enjoin proceedings in the state court but the appropriation itself, which is primarily by the ordinance of the city council, consummated by appraisal, payment and possession, and also because the proceedings in the state court are repugnant to the Constitution of the United States. *Wells-Fargo* v. *Taylor*, 254 U. S. 175, 183; *Smith* v. *Apple*, 264 U. S. 274, 279, 280.

The Present Condemnation is a Taking for a Non-public Use and Unconstitutional

It has been so held of similar attempts by every court of this country before which this question has ever come. It is true that this is the first time that the matter has been presented in a Federal court. The principle, however, that excess condemnation constitutes a taking for a non-public use and contravenes the right to due process of law and the fundamental rights of property has been declared and adjudged by the highest courts of Massachusetts, New York, North Carolina, Pennsylvania and Virginia, while the Court of Appeals of Maryland accorded an excess condemnation statute an interpretation so limited as to bring it within the constitutional limitations for which we contend.

The earliest case seems to have been that of

Dunn v. The City Council of Charleston (1824), Harper's Law Report, 189,

in which the court said concerning a statute attempting to confer that power upon the city:

> "To take the property of one man, and give it to another, would be contrary to all those immutable

principles of justice and common law, which have been consecrated by universal consent from time immemorial, and which are secured to us by the plain and unequivocal language of the Constitution. Such would be the effect of the act in question."

In the State of New York the matter first arose in **In re The Albany Street Extension, 11 Wendell 148 (1834)**, in which case it was held as follows:

"The Corporation of New York have not power to take more of the lands of individuals than is actually required for a street, and that portion of the act relating to the City of New York, which authorizes the commissioners of estimate and assessments to include in their assessment the *whole* of a lot, when *part* only is required for the use of a street, by means whereof the fee becomes vested in the corporation upon confirmation of the report of the commissioners, is *unconstitutional and void*, when such lands are taken without the consent of the owner."

Here the City of New York attempted to take a strip off of Trinity Church yard in addition to that necessary for the purpose of widening Albany Street. The Court, at page 152, referring to the statute, say:

"If this provision was intended merely to give to the corporation capacity to take property under such circumstances with the consent of the owner, and then dispose of the same, there can be no objection to it; but if it is to be taken literally, that the Commissioners may, against the consent of the owner, take the whole lot, when only a part is required for public use, and the residue to be applied to private use, it assumes a power which, with all respect, the legislature did not possess. The constitution, by authorizing the appropriation of private property to public use, impliedly declares, that for any other use, private property shall not be taken from one and applied to the use of an-

other. It is in violation of natural right, and if it is not in violation of the letter of the Constitution, it is of its spirit, and cannot be supported. * * *"

The foregoing case was approved and followed in

Embury v. Conner, 3 N. Y. 511 in 1850.

In 1863 the matter gave rise to the decision in the leading case in New York of

Bennett v. Boyle, 40 Barbour 551.

The opinion is sufficiently indicated by the following two paragraphs of the syllabus:

"1. The law of eminent domain extends to lands needed for public use and no further. Private property may be taken by the state and the title of the owners divested for this purpose and for no other."

"2. Where a statute authorizes the land of individuals to be taken for the purpose of widening an avenue in a city, the powers and jurisdiction of the commissioners are limited and restrained to the lines of the avenue as enlarged. Beyond and outside those lines they can exert no power or authority whatever."

In Massachusetts the General Assembly in 1910 requested of the Supreme Court its opinion as to the constitutionality of a statute involving excess condemnation.

Opinions of the Justices, 204 Mass. 607.

In answering this question in the negative the court said:

"The legislature cannot authorize a city to exercise the right of eminent domain in connection with the laying out of a public thoroughfare by taking land adjoining but outside the proposed thoroughfare with a view to its subsequent use by private individuals under conveyances, leases or agreements, although such use is intended to promote trade and perhaps also manufacturing by the erection of suitable buildings on the land, the purpose not being a public one within the meaning of the constitution of the Commonwealth."

At page 610 the court say:

> "* * * The only question about which there is a possibility of a doubt is whether the proposed use of the land outside of the thoroughfare is a public use. It is plain that a use of the property to obtain the possible income or profit that might inure to the city from the ownership and control of it would not be a public use. The city cannot be authorized to take the property of a private owner for such a purpose, nor can the city tax its inhabitants to obtain the money for such a use. It could as well tax them to raise money to carry on any other private business with a hope of gain. Such proceedings are entirely outside of the functions of a State or any subdivision of a State.
>
> "It is equally true and indubitable that a management and use of such property to promote the interests of merchants or traders who might occupy it, and to furnish better facilities for doing business and making profits, would not be a public but a private use."

And again on submission of a similar question by the legislature it was held in

Opinion of the Justices, 204 Mass. 616,

that:

> "1. It is not within the power of the Legislature, in connection with the widening of a highway or the laying-out of a new highway in the city of Boston, to authorize that city to take by right of eminent domain real estate in excess of those parcels which in whole or in part are necessary for the highway itself, with a view to the subsequent sale by the city of such excess of real estate at its full value subject to conditions or restrictions designed to promote the commercial and industrial welfare or growth of the municipality by insuring an opportunity for the construction along such highway of buildings adapted to the requirements of commerce, trade and industry and especially to the requirements of those forms of business which to a large extent employ teaming, thereby relieving

or helping to prevent the increase of congestion of traffic and so facilitating the transportation of freight and passengers through the section of the city in which such highway is widened or laid out."

Court at page 618 say:

"The suggestion is that the city, by right of eminent domain, take land outside the highway and pay for it with money raised by taxation. Seemingly, the predominant, if not the only purpose of doing this is to sell the land afterwards to individuals for use in the construction of buildings adapted to modern requirements of commerce, trade and industry. The city might or might not sell the land at a price above its cost, and in this way derive a pecuniary advantage, presumably the use of the land and buildings by individuals would increase their business and bring them prosperity, and thereby promote the growth of the city and the interests of the public. Such a result might be expected from a variety of other successful enterprises in different kinds of business. The use of money to promote such an enterprise is not a public use, within the meaning of the law, but a use bringing benefit to the public only indirectly, through the activity and success of individuals. Under our constitution money cannot be raised by taxation for such a purpose."

The only possible exception to the unbroken line of authority is the suggestion (not adjudication) that remnants of lots, so small and irregular as to be virtually useless may perhaps be included in the primary condemnation. This has no application to the properties here in question. Upon this subject, in the opinion from which we have just quoted, the Justices said:

"While it is plain that a city or town cannot take land outside of a public work for speculative purposes, we can conceive of a remnant of an estate, a part of which is necessarily taken, which remnant is so small,

> or of such shape and of so little value that the taking of it in the interest of economy or utility, or in some other public interest, may be fairly incidental and reasonably necessary, in connection with the taking of land for the public work. But this principle is not applicable to a taking for the larger purposes stated in the question before us." (p. 619.)

In the Richards case only one-fourth of the total property sought to be condemned is needed for the improvement; in the Reakirt case one-sixth; and in the Vester case none of the property is to be used directly for the improvement. Consequently this taking cannot be justified on the theory that only a remnant will be left after the improvement has been made.

In Pennsylvania the question squarely arose in the year 1913, in

Pennsylvania Mutual Life Insurance Company v. Philadelphia, 242 Pa. St. 47

and it was there held that:

> "1. The constitutional provision permitting the appropriation of private property for public use, contemplates an actual use by the public or the vesting of the right to such use in the public; the fact that the public may derive benefit, utility or advantage from the taking of land will not constitute public use within the meaning of the constitution, where it is not intended that the public shall use and enjoy the land appropriated."
>
> "3. The act authorizing cities to acquire land for parks, parkways and playgrounds, and to appropriate neighboring private property within 200 feet of the boundary line of such property so taken, and to resell such neighboring property under such restrictions in the deeds as will fully protect such parks, parkways, etc., and declaring such appropriation to be a taking for public use, is unconstitutional in so far as it au-

thorizes cities to take and appropriate private property within 200 feet of the boundary line of property appropriated for such parks, etc., as the use to which such property so taken is intended by the act to be put is not a public use."

In Virginia the same question was similarly dealt with in

City of Richmond v. Carneal, 129 Va. 388, 14 A. L. R. 1341 (1921).

We quote from the syllabus and the opinion as follows:

"1. The legislature cannot authorize an exercise of the power of eminent domain for the construction of a highway, which will include in the taking land outside the limits of the highway, to be replatted and sold.

"What constitutes a public use within the power to exercise eminent domain is a judicial question."

The Court at page 393 say:

"What is here proposed is to condemn land not needed for the street, replat it and sell it to others, presumably at a profit as no reason is assigned for the excess condemnation, except that the city council is of the opinion 'that not to acquire all, or parts of the property on certain blocks, squares or lots, through which the said proposed street will pass, would render it impracticable, without extraordinary expense, to make proposed improvement.' The lot owners are no more concerned than other taxpayers of the city with the cost of opening the street, but they have the right to insist that their property shall not be taken from them and sold at a profit, either to pay or to reduce the expense of opening the street. Such a transaction may be good financing on the part of the city, and greatly to its benefit, but such use of public property is not a public use. 'Public use' and 'public benefit' are not synonymous terms."

And at page 398:

> "Different courts sometimes arrive at different conclusions upon the same state of facts; but, whenever the remedy is applied, it should always be because there is a direct 'public use' of the property taken, and not a mere incidental or direct public benefit."

In Maryland in the case of

Duke Bond v. The Mayor and City Council of Baltimore, et al., 116 Maryland 683,

the Court of Appeals limited the operation of what was apparently an excess condemnation statute to the taking of the land actually necessary to the improvement in hand and avoided an interpretation which would have made it unconstitutional without passing upon the question specifically.

Naturally the text writers have taken the same view of the situation.

Cooley on "Constitutional Limitations," 8th ed., vol. 2, p. 1129, says:

> "The public use implies a possession, occupation and enjoyment of the land by the public at large, or by public agencies; and the due protection to the rights of private property will preclude the government from seizing it in the hands of the owners, and turning it over to another on vague grounds of public benefit to spring from a more profitable use to which the latter may devote it."

Nichols on "Eminent Domain," 2nd ed., vol. 1, page 179, speaking of excess condemnation in London and other Europeon cities, says:

> "Such an enterprise, although sanctioned in countries in which the power of the legislature is not restricted by a written constitution, involves the taking

of the property of one person and the sale of it to another for his own private use and, until recently at least, was impossible on account of the provisions of the state constitutions. Recently, however, there have been amendments adopted to some of the state constitutions designed to permit the taking of property for just such purposes, but it cannot be confidently stated that such improvements can now be effected until it has been determined whether a taking for such a purpose would not be a violation of the Fourteenth Amendment."

But of the question here in hand the same author has the following to say:

"* * * Construing such a statute as limited in its application to trifling and almost negligible remnants which would be unsuitable for private use after the part actually needed for public use had been appropriated, it would probably be sustained in some jurisdictions at least as authorizing a taking for a purpose reasonably incidental to the laying out of public ways; *but if the proposed taking savored at all of a municipal land speculation, no court would hesitate to hold it unconstitutional.*" (p. 178.) (Italics ours.)

Writing upon this subject in his monograph on excess condemnation, Professor Cushman of the University of Illinois says:

"Whether or not excess condemnation can be regarded as a justifiable measure of social control will depend in large measure upon the purpose for which it is employed. Certain it is, that the taking of surplus property in order to eradicate the evil of remnants of land, or in order to protect the beauty and usefulness of a public improvement, can be defended upon somewhat different principles from those which support the use of the scheme for the single purpose of making money for the city." (p. 11.)

"While the property of every citizen may be taxed for the purpose of securing public revenue, it has

never yet been suggested, in this country, that an empty treasury could justify the public authorities in depriving a man of his property by right of eminent domain." (p. 15.)

State Constitutions Cannot Surmount the Fourteenth Amendment

Our opponents call attention to amendments of the constitutions of several states, including Ohio, purporting to authorize excess condemnation to a greater or less extent.

The very necessity of adopting these state amendments is a strong admission that excess condemnation theretofore contravened their respective bills of rights. But certainly the Fourteenth Amendment is just as potent to protect the citizen against the taking of his property by the state without due process of law, as was the former constitution of any of these states. It is quite apparent that under such circumstances the state would have two barriers to surmount: its own fundamental law and the Constitution of the United States; and while a majority of the voters of Ohio had power to amend the constitution of this State, certainly their attempt was ineffectual to deprive the present respondents of their right to rely upon the guarantees of due process and equal protection contained in the Fourteenth Amendment.

Upon a similar subject the Supreme Court of Ohio, in *State* v. *Ferris,* 53 O. S. 314 said that the first section of the Fourteenth Amendment with reference to the equal protection of the laws is not broader than the second section of the bill of rights of the constitution of Ohio. The converse is quite as true. Therefore the constitutional rights of the respondents to due process and equal protection as against state and municipal action, are in no respects affected or lessened by the amendment of the state constitution.

We contend for an interpretation of the Ohio constitution that will bring it into consonance with the Fourteenth Amendment. *Madisonville Traction Co.* v. *St. Bernard Mining Co., supra; C. B. and Q. Ry. Co.* v. *Chicago, supra.*

It is argued that the judgment below overrides the constitution of a state. It does not. It merely confines its operation within the limits of the highest law. The real question is whether the attempted application of the Ohio constitution would override the Constitution of the United States.

No Answer to Say that Respondents Will be Fully Paid

Our opponents in their brief urge that this property is to be taken only after appraisal by a jury and the payment of the award, and argue that, inasmuch as the respondents will thus receive value for their property, they are accorded due process. *We answer that even a fair assessment can not justify a taking for a non-public use and that no amount of procedure, under those circumstances, can amount to due process and equal protection.*

In this respect we call attention to: *Chicago, Burlington and Quincy Railroad Company* v. *Chicago,* 166 U. S. 226 at pp. 234, 235:

> "Nor is the contention that the railroad company has been deprived of its property without due process of law entirely met by the suggestion that it had due notice of the proceedings for condemnation, appeared in court, and was admitted to make defense. It is true that this court has said that a trial in a court of justice according to the modes of proceeding applicable to such a case, secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice—the court having jurisdiction of the subject-matter and of the parties, and the defendant

having full opportunity to be heard—met the requirement of due process of law. *United States* v. *Cruikshank*, 92 U. S. 542, 554; *Leeper* v. *Texas*, 139 U. S. 462, 468. But a state may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form. This court, referring to the Fourteenth Amendment, has said: 'Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation.'" *Davidson* v. *New Orleans*, 96 U. S. 97, 102.

The Question of Public Use is Ultimately a Judicial Question

Whether the taking in question in any given case is for a public or a non-public use must necessarily depend upon the facts in that case and the problem is not answered by the fact that the voters of the state adopted a law or amendment that might be construed so broadly as to cover the use proposed. On the contrary, the question in each case is ultimately a judicial question. *Rindge Co.* v. *Los Angeles County*, 262 U. S. 700; *Sears* v. *City of Akron*, 246 U. S. 242.

Arbitrary and Unequal Classification Denies Equal Protection of the Laws

This condemnation attempts, in the language of our opponents, to "recoup" the cost of the improvement by taking and selling the lands of some of the neighbors, but not of others similarly situated. If condemnation for "re-

coupment" is permissible, certainly it ought to be laid upon the lands of all similarly situated.

The term "recoupment" is the English phrase covering the making of profit by excess condemnation, which was not originally intended by the Land Clauses Consolidation Act of 1845 in which it was said to have its origin. Cushman, in his work on "Excess Condemnation" above referred to, says:

> "What we, in America, term 'excess condemnation for the purpose of making money,' the Englishman describes by the one word 'recoupment.'" (p. 157.)

The English act named attempted to preserve in a measure the rights of the land owner by providing that the authorities, when finally ready to sell the surplus lands, *were required to offer them first to the persons who originally owned them.* Inasmuch as there seems to have been no authorization for, or practice of levying municipal assessments, the Metropolitan Board of London had recourse to excess condemnation and resale as a method of attempting to secure recoupment of the cost of the improvement, with, however, very poor success, and the proposition of adopting the American system of special assessments has been a matter, according to the same author, of lively discussion.

It will thus appear that this proposition of "recoupment," as it is put in England, or speculation upon the abutters' land, as we put it, is merely a plan to lay hold of the property of the abutting land owner, improve its frontage, and capture for the benefit of the public treasury any increment in value that may occur by selling it back to the former owner or to someone else. In this aspect it is, and indeed it has been in England regarded as, roughly, the equivalent of our special assessment.

In the instant case the lands of some abutters are subjected to this assessment, or capture of increment, and the

lands of others are not. For instance, between the land of the respondent Reakirt and the land of the respondent Vester lies an entire block of property comprising the Masonic Temple building and the John Van Range Co. building which are entirely exempted by favor from the application of this principle of recoupment. The property on the north side of the street, which will benefit equally with that upon the south side of the street, is also exempted. The scheme, therefore, which our opponents justify in their brief as a recapture by the city of an increment of value conferred upon adjacent property by the making of this improvement, does not bear equally upon all similarly situated, but is definitely, substantially and grossly unequal, and in this respect also seems to us to deny the respondents the equal protection of the laws. It certainly does so as a matter of fact.

We contend that, in its essence, the unequal burden laid upon the respondents here is no different from that enjoined in *Gast Realty Co.* v. *Schneider Granite Co.*, 240 U. S. 55.

Excess Condemnation in Other Cities.

The brief of the city devotes much space to alleged uses of excess condemnation elsewhere—pages 26 to 41. Three plats are reproduced as representing several instances of such uses by the City of Rochester; also a plat of Kingsway, London, is set forth. These are no part of the record in the present case. They are substantiated by no evidence. We have not had the means of inquiring into the particular circumstances of the appropriation of these lands. We suspect that the Rochester instances would have been found, had they been brought forward in proof by witnesses, subject to cross-examination, to have been mere purchases under the form of appropriation and the result of voluntary bargain and sale between the city and the land owner.

There seems to be no report of any case growing out of these condemnations or of any resistance thereto on the part of the owners. We can only assume acquiescence or voluntary co-operation.

The appendix to the brief filed by the *amicus curiae* on behalf of New York brings forward some pictures and plats not in the evidence, supposed to show the evils resulting from the ancient and time honored method of taking what is needed. These are also no part of the record in this case and seem to us to have little or no bearing upon the constitutional rights of the parties hereto.

Both counsel draw largely upon the writings of enthusiasts for excess condemnation in substantiation of their arguments. These go, in large part, beyond the record of the present case and into the general question of the value of excess condemnation as applied under any and all circumstances. We, on the contrary, endeavor to restrict ourselves to the instant case. We here claim no more than that the property of Llewellyn B. Reakirt is being ruthlessly taken for the mere purpose of speculation and for no other purpose whatsoever; that Mrs. Vester's property is no "remnant" and is being taken for the same reason; and that while one-fourth of the Richards property is desired by the city for legitimate purposes, the other three-fourths is neither unusable nor unsaleable in the hands of the owners who wish to retain it; that it is not a "remnant" and is also condemned, on the record here presented, for the mere purpose of resale for profit.

The fact that our opponents stress the generalities, foreign illustrations, plats, and pictures not in evidence rather than the actual record, seems to indicate a desire on their part to avoid the specific issues presented.

It is significant that the amicus curiae who presents the brief on behalf of New York finds no warrant whatever for the excess appropriation of Mr. Reakirt's property, and,

refrains from any attempt to justify the appropriation thereof on the ground of "recoupment" or speculation or any other ground.

The history of excess condemnation in the United States is rather flaunted. When examined, however, that history will be found to reveal nothing more than a number of statute and constitutional amendments purporting to grant the power to a greater or less degree, a very few instances of the attempted application thereof, *and a uniform and unbroken line of judicial decisions upholding the right of the property owner against these attempts to take his land and sell it to somebody else.*

Foreign Illustrations

Our opponents refer to historical uses of excess condemnation abroad, among others to the Boulevard Haussmann in Paris. The right of excess condemnation was there virtually farmed out to the contractor, for whose use and at whose expense the city condemned, he having the privilege of building the boulevards and selling upon this speculation the lands thus acquired for him under the right of eminent domain by the City of Paris. (Cushman, pp. 149-150.)

It is certainly hard to conceive of such a scheme as within the limits of the constitutional rights of citizens of the United States. That a street contractor should be given the right to condemn and speculate upon an area of land as his recompense for building a street, seems to us to offer a good illustration of the evils against which the fundamental rights that we invoke should protect.

As may be expected, the Boulevard Haussmann as a financial venture was not a success. Excess condemnation seems to have been abandoned in Paris. (Id., p. 152.)

The same scheme was tried in Brussels with the result "that the city went to the verge of bankruptcy with a debt

of some $50,000,000. It still held title in 1904 to some four hundred buildings which it rented, and for which it had paid about $6,400,000, perhaps a million dollars more than it could get from the sale of them." (Id., pp. 154-155.)

This, of course, is no legal reason for denying the right of excess condemnation, but we offer it in answer to our opponent's suggestion that the scheme is good morals and good business, and also to illustrate that it is highly speculative.

Foreign countries seem not to have universally approved the legality of this scheme, for we find the assertion that it has been held unconstitutional in the Republic of Switzerland and also in the Argentine Republic in a foot note, which we do not have the means at hand of verifying, in Professor Cushman's book, page 275, as follows:

> "Professor W. F. Dodd states that the power of excess condemnation has been held unconstitutional in Switzerland. (Entscheidungen des Schweizerischen Bundesgerichts, Vol. 31 [1905], Part 1, p. 645); and Argentina (Fallos de la Suprema Corte, Vol. 33 [1888], p. 162.) Cited in article on "Political Safeguards and Judicial Guaranties," Columbia Law Review, Vol. xv, p. 306, note."

Could Land Speculation be the Primary Object of an Appropriation?

Our opponents argue that "public use" means not use by the public of the land to be appropriated but is synonymous with "public benefit," and that the laying of lands under condemnation for the capture of the increment in value is a public benefit and therefore valid. They argue here that if they need twenty-five feet off the edge of Mr. Reakirt's property they have the right to take the other 125 feet in depth. There is, of course, no reason why they should stop there. If their theory be sound they are en-

titled to go to any limit or embrace any property which they conceive may afford a probable opportunity for the realization of profit. If this right of excess condemnation can be based upon an appropriation along the margin of twenty-five feet, it may similarly be based upon the taking for actual use of ten or five feet or of one foot, or perhaps six inches or less. Thus any street widening exposes the owner of the adjacent property, no matter how valuable to him as an established business stand or as a home, to the danger of its being taken upon appraisal by the jury and resold to another.

The question arises, why the necessity of taking any part at all for actual use? If condemnation for speculation for the enrichment of the public treasury by dealing in real estate be a public use, it is not necessary to attach it to any other public use. It would seem that as a public use it must stand upon its own bottom, or fall altogether.

Cushman says:

> "But on the other hand if the city may condemn land in excess solely because it needs the money which it hopes to make from the resale of the land, where, it may well be asked, is the land which the city may not properly take for such a purpose?" (p. 15.)

The present land speculation, the taking of Mrs. Vester's property, which is disassociated and removed from the area of the actual improvement, is certainly in no just sense incident to the primary condemnation; and the same may be said of the taking of the residue of Mr. Reakirt's property, of which only a small margin is desired.

Speculation in Fact

Under the laws of Ohio after the jury shall have set its award upon the property of the respondents, if allowed to proceed with this condemnation the city will have until judg-

ment is entered confirming the same and six months thereafter in which to determine whether or not it will accept the property at the valuation placed upon it by the jury. It has this right as to each parcel thereof separately and severally. Thus the city will acquire for a space of six months and as much longer as the entry of the judgment may be delayed, an option upon respondents' properties at the award made. The city has evidently had this in mind, for in appropriating this property it has described the twenty-five-foot strip and the excess as *separate parcels,* so that it will gain the right to take the one and leave the other if it so desires. Thus it will obtain the refusal of the excess of respondents' property at a figure separate from that placed upon the twenty-five-foot strip.

General Code Section 3697 is as follows:

> "Section 3697. *Neglect to pay or take possession in six months; attorney's fees.* When a municipal corporation makes an appropriation of property, and fails to pay or take possession thereof, within six months after the assessment of compensation shall have been made, its right to make such appropriation on the terms of the assessment so made shall cease and determine, and lands so appropriated shall be relieved from all incumbrance on account of any of the proceedings in such case, and the judgment or order of the court directing such assessment to be paid shall cease to be of any effect, except as to the costs adjudged against the corporation. Upon motion of any defendant, such costs may be retaxed, and a reasonable attorney's fee paid to the attorney of such defendant, which, together with any other proper expenses incurred by the defendant, may be included in the costs."

While such owner is entitled to a reasonable attorney's fee and costs in the event of abandonment, there is no provision for compensation for the holding of his property under option until the verdict is confirmed by the court,

and for six months thereafter until relinquished, in the event the city is not satisfied with the valuation placed thereon and decides not to take. The land owner must meantime stand helplessly by while the city, with nothing to lose, gambles with his property taken as "excess for resale." This seems to us to be nothing short of a flagrant case of the taking of property without due process of law.

It is not even provided that the former owner shall have the first opportunity to purchase, or the refusal of the property at its offered price in the event of a resale. That was the practice in the English attempts to substitute excess condemnation for special assessment, and is also provided in the Rhode Island amendment. The least semblance of common justice would seem to require it. The proposition of the City of Cincinnati is, on the contrary, that on the pretext of the slightest street widening, one man's place of business may be taken as a "remnant" and sold to his rival by sealed proposals, or in any other way that the statute may permit. It need not even be a "remnant," but may, on the city's theory, be property adjoining a remnant, or even property which adjoins property which adjoins a remnant. In short, under the Ohio law as contended for, the power of eminent domain includes whatever a city desires to take as "excess."

It is also the law of Ohio that the rights of the city are not exhausted by the abandonment of an assessment, but the city may thereafter appropriate and secure a re-assessment. *Trustees of the Cincinnati Southern Railway* v. *Hass*, 42 O. S. 239.

It is apparent that during this interval of option there would be a period of active endeavor to dispose of the excess so acquired by the city.

This activity of the city would be accentuated by the fact that the record shows that the city has no available funds with which to pay for this excess that it now seeks to con-

demn, and therefore would first have to sell to Peter to pay Paul, so to speak.

The total fund available to the city for the improvement is $1,600,000. The estimate for the twenty-five-foot strip is $2,000,000, without paving. The stated cost of the excess is from $3,500,000 to $5,000,000 (R. 81). The city cannot pay for the excess lands by the issuance of bonds because the only bonds which can be issued under the constitutional provision in question (Article XVIII, Section 10, Ohio Constitution) are bonds secured merely by a lien upon the property condemned and are not general obligations of the city, either as to principal or interest, and therefore, of course, unsalable, as nobody will lend one hundred percent upon a jury's valuation without any recourse whatever against the city.

The city therefore has no available fund for this excess condemnation and the only way it could accomplish its object would be by a resale within the period of its aforesaid six months' option. If the award proved too high for the market the city would, of course, dismiss the case at its costs, paying counsel fees, and either condemn again or drop the affair altogether. It seems intolerable that a property owner should be subjected to such a state of affairs.

That the value of the adjacent property will be in any way enhanced by the widening of the street is a pure assumption on the part of our opponents, based upon nothing definite. City street widening is common in these days of automobile traffic congestion. This widening is primarily to afford a broader and swifter path for motor vehicles. There is no real reason to assume that any benefit whatever will be conferred upon the adjacent lands. The probabilities are to the contrary. It is well known that narrow down-town streets are frequently the most important and property abutting thereon the most valuable. The case continues, in every aspect, to be a mere speculation.

Our Opponent's Citations

Our opponents have brought forth the outpost cases, those in which the right of eminent domain has been pushed to its utmost limitations, but have been unable to cite any case in which the taking of property primarily for the purpose of resale at a profit has been upheld by any court.

Clark v. *Nash*, 198 U. S. 361, involved the right of Nash to condemn a right of way for a ditch across the property of Clark for the purpose of bringing water to Nash's land for irrigation purposes from a mountain stream known as Fort Canyon Creek. Plaintiff claimed to be entitled by law to the use of a certain amount of the flow of the waters of that creek, under the laws of the State of Utah, and to have no other way of getting the same to his land except by the enlargement of a certain ditch that seems to have already existed, from the creek, and the purpose of his suit seems to have been to widen the ditch about one foot. The damages were assessed at $40.00.

The court confined the opinion to the particular case, holding that upon the facts stated in the findings of the court the use was a public one; that other land owners adjacent might share in the use of the water by taking the same proceedings; that it was not necessary that all should join in one proceeding, or that a water company should be formed; and that the rights of a riparian owner in and to the use of water flowing by his land are not the same in the arid and mountainous states of the west as they are in the states of the east.

This was a case of the enlargement of an already existing way of necessity from land to the only available supply of water. The distribution of water supply is, broadly speaking, a well recognized public function. The case is, therefore, entirely different from one in which the object is resale for profit.

This case, however, carries with it the following reservation:

> "But we do not desire to be understood by this decision as approving of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the State."

Strickley v. *Highland Boy Gold Mining Company*, 200 U. S. 527 is in principle much the same. The condemnation was for an aerial bucket line across a placer mining claim, brought by a mining corporation which enjoyed the right of eminent domain under the laws of Utah. This court said:

> "If, as seems to be assumed in the brief for the defendant in error, the finding that the plaintiff is a carrier for itself and others means that the line is dedicated to carrying for whatever portion of the public may desire to use it, the foundation of the argument on the other side disappears."

Speaking of *Clark* v. *Nash, supra*, the opinion says:

> "While emphasizing the great caution necessary to be shown, it proved that there might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation which under other circumstances would be left wholly to voluntary consent."

There is nothing in the present case which indicates that the foundations of the public welfare of Cincinnati require that Mrs. Vester should concede her house and lot to the city at an appraised value merely that it may be aggregated with other properties and resold for profit, or perhaps turned back to her after more than a six months' delay, upon the city's being unable to resell at a profit. Certainly there is no fundamental necessity that justifies

the city in taking five-sixths of Mr. Reakirt's lot when only one-sixth is needed or desired for the actual purpose of street widening. We think the same is true of the Richards property.

In *Old Dominion Land Co.* v. *United States,* 269 U. S. 55, the Government condemned land which it had held under lease during the late war for military purposes and upon which it had put structures costing more than a million and a half dollars. The land was valued at $129,000 by a jury. The Government had thirty days after the expiration of the lease to remove the buildings and had offered to purchase the property, but the offer being refused, the condemnation was instituted within thirty days and before the time for removal had run out. Congress had specifically appropriated money for the acquisition of this land. When the proceedings were begun the buildings belonged to the United States and this court said it would not be just to allow the delay necessary in legal proceedings to deny the United States rights it had and endeavored by this suit to assert. It was further held that the declaration of Congress that the purpose was a public use was not overcome by anything in the evidence, and that its decision was entitled to deference until it was shown to involve an impossibility.

There were, however, certain military purposes mentioned in the Act of Congress and the court said:

> "But the military purposes mentioned at least may have been entertained and they clearly were for a public use."

In that case the Government desired to remove the buildings and the buildings were a part of the land. The buildings had cost the Government the large sum mentioned. To condemn land for the purpose of removing a part of it is, of course, common practice—for instance, borrow pits for railroads. We see nothing but a strictly public use of

the land itself in the purpose of the Government to remove therefrom the buildings which it had built.

It is therefore submitted that there is no analogy whatever to the present case.

In *Hairston* v. *Danville and Western Railway Company*, 208 U. S. 598, the railway company was condemning for a spur track which it alleged to be needed for the transaction of its business, *for the accommodation of the public generally*, and for the purpose of reaching the factories of a tobacco company. It was shown that this track would greatly enlarge the team track facilities of the railroad; that five hundred feet of the proposed track was level and would be used entirely for the public and would store sixteen or eighteen team track cars for the general public. The court, on page 608, said that it is unnecessary to consider whether a condemnation by a railroad, authorized by the state and approved by a state court, of land for the construction of a spur track to be used solely to transport commodities to the main line and thence to the place of sale and consumption throughout the country, is a violation of the Fourteenth Amendment; nor the authorities bearing upon the question whether such is a public use.

> "Here the proposed spur track can be used, and was designed to be used, not only for access to the factory of the tobacco company but for the storage of cars to be laden or unladen by receivers and shippers of freight, and to relieve the congestion of business which, through the growth of the town, overburdened the limited trackage of the railroad. * * *
>
> "This testimony describes a use which is clearly public."

The Hairston case, therefore, presented the question not of an exclusively private, but of a partly public railway siding or spur, and the upholding of the appropriation there made, we submit, has not the slightest tendency to

sustain the efforts of the city to take the lands of the respondents for the purpose shown in this case.

United States v. *Gettysburg Electric Railway Company*, 160 U. S. 668, involved the right of the Government to found the Gettysburg Battle Park and condemn land for that purpose. That appropriation certainly finds no analogy to the taking of private property for speculative purposes.

Mt. Vernon-Woodberry Cotton Duck Company v. *Alabama Interstate Power Company*, 240 U. S. 30, was an appropriation of land and water rights for the purpose of making, supplying and selling to the public, power produced by water as a motive force; that is, to supply a general, fundamental and public need. The land itself was to be used for the public. Here no use is proposed to be made of the lands of respondents. The public, so far as appears, are not to physically enjoy the possession of the lands as a park or the like, nor are they to receive anything produced thereon. The distinction seems very apparent.

Head v. *Amoskeag Manufacturing Company*, 113 U. S. 9, is, of course, the leading mill-site case. The court, at page 21, say:

> "We prefer to rest the decision of this case upon the ground that such a statute, considered as regulating the manner in which the rights of proprietors of lands adjacent to a stream may be asserted and enjoyed, with a due regard to the interests of all, and to the public good, is within the constitutional power of the legislature.
>
> "When property, in which several persons have a common interest, cannot be fully and beneficially enjoyed in its existing condition, the law often provides a way in which they may compel one another to submit to measures necessary to secure its beneficial enjoyment, making equitable compensation to any whose control of or interest in the property is thereby modified."

Our opponents cite *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112. We also rely upon the same case. In this case, so far as the question of public use was concerned, the fundamental question was whether a general irrigation district for the irrigation of the arid lands of all owners within the district was a use of that description, so as to sustain the validity of an assessment laid against the land of one of the proprietors. It does not seem to reach the instant case. If we were attempting to resist an assessment for the laying of water mains through the respondents' lands to serve them and the public generally, the question would be parallel. But we are not. Mr. Reakirt and his lessees wish to hold their land so that they may improve it according to the building laws and the building code and the zoning ordinances of the city, and their own tastes, ambitions and desires, and not to be compelled to surrender it to the city to resell to someone else to improve according to his desires, with, of course, an intermediate profit to the city. The same is true as to the other respondents.

Not one of these cases sustains the condemnation of real estate for the purpose of resale. No judicial authority in this country can be brought forward substantiating such a project. The outpost cases which our opponents have cited fall far short of embracing the principle for which the city contends.

Zoning Ordinances are Exercise of Police Power and Do Not Apply

Our opponents bring forward the cases sustaining the zoning ordinances and say that in a very real sense the ordinary excess condemnation undertaking is a zoning enterprise on an equitable basis. In *Euclid* v. *Ambler Realty Company*, 272 U. S. 365 and *Gorieb* v. *Fox*, 274 U. S. 603 the ordinances are sustained as an exercise of the police power, with substantial relation to the public health, morals,

and general welfare. They involve in no way the exercise of the power of eminent domain; on the contrary, they sustain the right to regulate the use of municipal areas without the making of compensation. The properties of the respondents are already subject to all of the building and zoning laws of the state and city, and if further regulation is the purpose of the city, within reasonable limits, all that is necessary is for the city to enact the same by ordinance. Certainly it is no reason to condemn the respondents' property to say that the same may be constitutionally subjected to zoning ordinances and similar regulations.

The Opinions of the Lower Courts

Remnants

It is argued that unusable and unsaleable remnants may be taken; that, therefore, it is within the power of the city to define remnants, and that a lot may be made a remnant by calling it such, and that having once created a "remnant" *eo nomine* the city may go as far as it likes in the condemnation of contiguous lands, and of lands contiguous to contiguous lands, indefinitely, to add to such remnant in order to produce what it may conceive to be a plot of ground of sufficient size for resale for the development of the neighborhood in accordance with its ideas.

This seems to us merely to prove that when the unwarranted invasion of property rights is once begun there is no limit. We submit that the inviolability of property, except when needed for a genuine public use, is of vastly more importance than the convenience of municipalities in the claimed power to take from one and sell to another to an indefinite extent on the pretext that occasionally an owner may be left with a small and oddly shaped lot.

The opinion of the United States District Court for the Southern District of Ohio, by Judge Hickenlooper, will be found in the record at page 26, and is based, of course,

upon a first-hand hearing of the evidence and the statements of counsel. The opinion of the Circuit Court of Appeals, by Judge Moorman, is at page 103 of the record and is to be found reported in 33 Fed. 2nd at page 242.

With regard to the so-called "remnants" theory the court said:

> "The remnants theory, as technically considered, is not applicable to the property here involved. No part of the Vester property is included in the 25-foot strip. Only one-sixth of the Reakirt property is included therein, and the remaining five-sixths is sufficiently large for appropriate building sites for that section of the city. Similarly, what is left of the Richards property, three-fourths, would be valuable and utilizable for purposes suitable to the location of the property. Thus in one case no part of the property is to be occupied by the street, and in each of the others there will be enough left to meet the needs of suitable buildings for that vicinity. Consequently, in none of them can it be said that in assessing damages to the owner the jury would be justified in taking as its criterion the value of the entire tract. It ought not to be held, we think, that, because there would be unusable portions of other adjacent lots, the city should have the right to take property that is usable merely to join it with those unusable remnants in order to sell them advantageously."

The theory of remnants is much stressed by the proponents of excess condemnation and may be stretched so as to cover a multitude of sins. In the City of Paris, to which our opponents are fond of referring, very large remnants of land, some of them five thousand feet in area, were condemned by the city.

> "These remnants were resold for building lots, and in some cases the remnant, which had been taken as being too small to allow the erection of a wholesome building thereon, was divided into two lots, each of

which was sold by itself for a building lot." Cushman, p. 55.

The so-called remnant of Mr. Reakirt's property is 17,500 square feet, or more than one-third of an acre of land, rectangular in shape, a vacant lot, fronting on two main thoroughfares in the heart of the City of Cincinnati.

Mrs. Vester's property, if remnant at all, is all remnant, because the city takes no part of it.

The so-called remnant of the Richards property is seventy-five percent of the entirety with frontage upon two streets.

We submit that both of the lower courts were right in determining that the remnant theory had no proper application to the present case.

"Recoupment"

Under the heading "Recoupment of Expense" in our opponent's brief it is admitted that the City of Cincinnati is practically entering the real estate business by appropriating, among others, the lands of the respondents and attempting to realize a profit therefrom with which to pay for the land appropriated and also the cost of the street, sewer, water and other improvements. They justify this action by saying that in most cases the general taxpayer pay the greater portion of the cost, being aided only by special assessments. Our answer is that not only is the abutting property benefited, but many square miles of territory in the outlying districts will be brought that much nearer to the center of the city by the widened and improved highway and the value of this land will be indirectly increased. Let the city, therefore, proceed in the constitutional way of making assessments according to benefits upon the lands in question and other abutting property, and charge the balance to the general taxpayer who will receive by far the greater benefit from the improvement.

CONCLUSION

We submit that the record under consideration presents an attempt to take the property of the respondents for mere speculative purposes. As to the Reakirt tract, no other purpose is even suggested. As to the Vester property, it shows an attempt to reach out beyond the bounds of the improvement and acquire an independent and unrelated property also for purposes of speculation. As to the Richards property, the city needs but one-fourth and has attempted to designate the remaining three-fourths a "remnant," a misnomer.

The real effort of the city is to pay for an improvement by speculating in some of the adjacent property.

We submit that this is in contravention of the Fourteenth Amendment to the Constitution of the United States, and that the courts below were right in protecting the respondents against this usurpation of power by the writ of injunction.

Respectfully submitted,

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